IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

NO. 82

SERGEANT HERBERT N. CARRINGTON,
Petitioner

vs.

ALAN V. RASH, *et al.*,
Respondents

On Writ of Certiorari to the Supreme Court of the State of Texas

REPLY BRIEF FOR RESPONDENT WAGGONER CARR, ATTORNEY GENERAL OF TEXAS
(Answering Reply Brief for the Petitioner)

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MOTION FOR LEAVE TO FILE REPLY BRIEF

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Pursuant to Paragraph 3 of Rule 41, Rules of the Supreme Court, Respondent moves for leave to file a reply brief in answer to the reply brief for the Petitioner. Respondent had intended to answer in oral argument the contentions made in Petitioner's reply brief and had thought that a written reply would not be necessary. However, more time than anticipated was consumed in answering questions from the Bench, and the matters covered in the attached brief were not reached in oral argument. Respondent believes that they deserve an answer, and therefore requests leave to file this reply brief.

REPLY BRIEF

I.

Petitioner states on page 6 of his reply brief that "because of the Fourteenth Amendment no citizen of the United States can be forced to 'voluntarily' relinquish his right to vote merely by choosing to reside in a particular state."

Under the laws of all the States, only those persons who are legal residents of the State may vote—mere sojourners are never allowed to vote; and no new resident can vote in state and local elections until he has resided within the State for a prescribed length of time. The most usual period is one year, but two States require a residence of two years. During this period, the new resident is completely disfranchised. Yet this requirement has been sustained against attacks of unconstitutionality. *Pope v. Williams,* 193 U.S. 621 (1904); *Drueding v. Devlin,* 234 F.Supp. 721 (D. Maryland, 1964). So we see that every new resident is forced, for a time, to "relinquish his right to vote merely by choosing to reside in a particular state," and that is all that Petitioner, having chosen to become a resident of El Paso, is being required to do.

The recent case of *Drueding v. Devlin, supra,* which is now pending on appeal to this Court, as Docket No. 772, on the question of the validity of the length-of-residence requirement as applied to voting in elections for President and Vice President, reiterates the usual statement that one of the purposes of the rquirement is to insure that the voter will "become in fact a member of the community, and as such have a common interest in all matters pertaining to its government."

No matter how strongly a soldier might wish to remain at his present station, he has no volition in the matter. He is subject at all times to the orders of his superiors, which may take him away from there whether he wishes it or not. Actually, he is never more than a sojourner throughout his period of service. As long as he continues in military status, he cannot "become in fact a member of the community." So the same reason which justifies withholding voting privileges from a new resident for the one year or the two years provided by state law also justifies withholding voting privileges from a new resident in military service throughout his period of service.

The Texas law permits a soldier to acquire a residence during service for all purposes except voting. It is our contention that the State could lawfully deny to military personnel a right to acquire a new residence within the State for any purpose while they are in service because of this impermanence which inheres in their stationing; and if the State does allow them to acquire a new residence, it may prescribe the conditions and it may regulate the privileges which attach to the residence thus gained.

The soldier's presence at the place where he is stationed is not voluntary. He is there by order of superior authority. With respect to other classes of persons, the general rule is that residence may not be acquired by involuntary presence. This is an application of the legal principle which denies to certain classes of persons the power to select their domicile—they simply lack the capacity to make a choice. Thus, persons who are confined in prison cannot acquire residence at the place of confinement, even though they may intend to

remain in that community after confinement ends. This rule appears to be followed without exception, and has been formulated into § 21 of the Restatement of Conflict of Laws under the following general rule:

> "A person cannot acquire a domicil of choice by any act done under legal or physical compulsion."

Comment (a) of this section states that "a person does not acquire a domicil of choice in a place which he cannot legally leave when he chooses to do so. The fact that he decides not to leave is immaterial; as also is his legal right and intention to remain after the period of legal detention expires." The following is given as an illustration:

> "A's domicil is X. A is released from jail on bond and required to live within a prescribed area, Y. A rents a house in Y, sends for his family, lives in Y for years and announces that he has no intention of leaving Y when the period of required residence expires. A, during the period of required residence in Y, is still domiciled in X."

This lack of volition is also the ground on which the courts in a large number of States hold that a person in military service cannot acquire a residence while living in assigned quarters at a military post, regardless of what his intent may be; and some courts, especially in earlier days, have applied the rule to all military personnel. The Restatement of Conflicts sets out the following rule in Comment (c) of § 21:

> "c. *Soldiers and sailors.* A soldier or sailor, if he is ordered to a station to which he must go and live in quarters assigned to him, cannot acquire a domicil there though he lives in the assigned quarters with his family; for he must obey orders and cannot choose to go elsewhere. If, however, he is

allowed to live with his family where he pleases provided it is near enough to his post to enable him to perform his duty, he can acquire a domicil where he lives."

Cases holding that a person in military service cannot acquire a domicile while living in assigned quarters are collected in a note in 21 A.L.R.2d at page 1173.

To our knowledge, there has never been any holding, or any intimation, that a state law prohibiting a soldier from acquiring residence while living on the post exceeds the authority of the State to prescribe the conditions under which residence can be acquired. But those living off the post are present in the community because they are under military orders stationing them there. They are in the same position as the parolee who is compelled to remain within a prescribed area. It would be within the power of the State to deny to them also legal ability to acquire a residence during that period of time. So far as we can find, there has never been a case holding otherwise.

The analogy to prisoners is perhaps unsavory, so let us make another analogy. The rule in most States, including Texas, is that the husband selects the domicile, and the wife has no choice in the matter. Suppose Sergeant Carrington had not chosen to claim El Paso as the place of family domicile. No matter how much Mrs. Carrington might want El Paso to be the family's permanent home, *she* could not establish legal residence there for herself or for any member of her family, because she has no power to choose. The same principle would support a rule preventing Sergeant Carrington or anyone else in military service from acquiring legal residence during service. He does not and cannot choose

where he is to be stationed or how long he remains. The United States Army chooses for him.

II.

On pages 5 and 7 of his reply brief, Petitioner says that there are many groups of civilians who possess the same characteristics as servicemen, and argues that the servicemen are denied equal protection because these civilians are not subjected to a similar limitation on place of voting.

On the characteristic of cohesion, he mentions the Teamsters Union, the NAACP, and the American Medical Association as examples. On the characteristic of impermanence of residence, he mentions members of college faculties and graduate students, and also "employees of large national corporations, who," he says, "are often employed for a limited number of years in a particular local community."

Whether members of the groups Petitioner mentions display the sort of cohesion we are talking about is debatable. The members of each group have common interests and outlooks in certain fields, and in those fields they are likely to think and vote in the same manner, not because they belong to the group but because that is the way they believe. More important, Petitioner does not contend that there are civilian groups possessing all of the several characteristics which have influenced the imposition of the restriction on place of military voting, and we submit that none exists within the State of Texas. The validity of the classification is to be tested by the sum of all the elements which contribute to its reasonableness, and not by each separate element standing alone. The concur-

rence of the concentration of military personnel within a small geographical area, cohesion of the members, subjection to superior authority, impermanence of residence, absence of self-choice on whether to go or to remain—all these elements taken together—provides the backdrop for the restriction.

If other groups possessing similar characteristics do exist, the burden is on Petitioner to prove it. But in fact none could exist, because no civilian can be compelled to go from or to stay in any particular place except persons under sentence of confinement or under compulsory medical treatment.

Even granting the existence of civilian groups possessing all the material characteristics, the fact that the State has not acted to restrict their voting to the last place where they lived before they took up their nomadic occupation does not invalidate the restriction on military voting. The cases are legion which hold that a classification is not rendered invalid merely because it fails to cover "the whole field of possible abuses." The rule was stated again by this Court only last December, in *McLaughlin v. Florida,* 85 S.Ct. 283, 288, in this language:

> "Normally, the widest discretion is allowed the legislative judgment in determining whether to attack some rather than all of the manifestations of the evil aimed at; and normally that judgment is given the benefit of every conceivable circumstance which might suffice to characterize the classification as reasonable rather than arbitrary and invidious."

On page 5 of his reply brief, Petitioner says that there are no differentiating characteristics between the

servicemen and their wives, who are allowed to vote at a place of residence acquired while their husbands are in service, and that to distinguish between the two denies the military husbands equal protection of the laws. However, there *are* differentiating characteristics. The wife is not subjected to indoctrination programs designed to instill loyalty to the commanding officers and the organization, nor would she be subjected to indoctrination in concepts and views favored by a commanding officer. She is not subject to military discipline—she can't be put on KP, or restricted for the week end. If the husband is ordered to some other base, she is not compelled to go also. In fact, in *Mabry v. Davis* both plaintiffs testified that if they were ordered elsewhere, their wives would remain in San Antonio. Further, as a practical matter, the restriction on the husband's place of voting operates as a check on the number of wives who become voters at the place where their husbands are stationed. It acts as a deterrent to acquisition of residence by the husband, and since the wife's residence is fixed by that of the husband, the threat posed by not also restricting place of voting of the wives is substantially diluted by the restriction on the husband. If on no other ground, failure to include the wives could be justified on the lesser magnitude of the threat posed by their group.

III.

Petitioner in effect has said on page 3 of his reply brief that even though the State's public policy may have been sound in 1837, it is no longer sound because the military structure in this country has changed substantially in the past 120 years. In answer to this, we are content in this brief merely to cite the Chief Jus-

tice's statement in 1962, quoted on page 20 of our main brief, that the axiom of subordination of the military to the civil is not an anachronism today. Military structure may have changed, but those characteristics of military life and military authority which motivated the Texas law continue to exist today.

This is as good a place as any to answer the contention which Petitioner has made on page 4 of his reply brief that the secret ballot is ample protection against the coercion of a commanding officer. The number of members of his command who were eligible to vote and who actually did vote within each voting precinct could readily be ascertained,[1] and the entire group could be made to feel his retaliation if the number of votes favorable to his desires did not measure up to his expectations. Anyone who has served as a private, as the writer did during World War II, knows that group punishment for misdeeds that cannot be pinned on the individual culprits is not a figment of the imagination.

IV.

On page 7 of his reply brief, Petitioner says that Respondent, though recognizing that Petitioner is a bona fide resident of El Paso County, claims that Petitioner's acquiring a bona fide residence in Texas is not typical of members of the military stationed in Texas. He says that there are other servicemen similarly situated, but he offers no proof or even a surmise as to their number.

We do indeed contend that Petitioner, in averring

[1]The lists of qualified voters (those eligible to vote) and the poll lists (those who actually vote) are open to public inspection. Arts. 3.02, 5.22, and 8.29b, Vernon's Texas Election Code (Amendments of 1963).

an intent to reside in the county where he now lives "for the remainder of his life" (R. 3) is not typical of military personnel who potentially are claimants or who actually do claim legal residence at the place where they are stationed.

As stated in our main brief, pp. 23-24, all that a serviceman must be able to show in order to establish residence at his duty station is that he does not intend to return to the place last claimed as his home and that he intends to remain at his present station until ordered elsewhere. As applied to Petitioner, he would not have to show that he intended ever to come back to El Paso if he were sent elsewhere, or that he intended to stay in El Paso after completing military service if he were not sent elsewhere before then.

Parenthetically, contrary to the intimation on page 7 of Petitioner's reply brief, we do not say that persons who acquire residence without an intent to remain permanently are not "bona fide" residents. What we do say is that a person in military service whose residence is based merely on an intent not to go back to where he came from is in effect no more than a sojourner, because his military duty may take him away to some other place at any moment, without any intent on his part ever to return.

Petitioner says that there are other servicemen who have acquired a residence in Texas with the intent of making it their permanent home. The two plaintiffs in the *Mabry* case are in this category. We have no doubt that there are also some others; but how many? We reiterate that they are not typical of military personnel generally. It is our contention that even as to them there is a rational basis for treating them in the same

manner as all other military personnel. Since the choice is not theirs as to their present location, they are unable to have more than a present intent to make a certain place their home at some time in the future, after termination of their military career. It is the universal rule that intent to make one's home at a place at a future date will not support a claim of present residence there.

But even if there was no rational basis for treating Petitioner and others similarly situated in the same manner as all other military personnel, the fact that they are subject to an inequality will not render the law invalid if they constitute merely isolated examples out of the whole class. In the language of this Court in *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, "a classification having some reasonable basis does not offend against the Equal Protection Clause merely because it is not made with mathematical nicety or because in practice it results in some inequality." This rule has been repeated time and again. If the number is so substantial that the group should be treated as a separate class, the burden is on Petitioner to prove the fact. This he has wholly failed to do.

Respectfully submitted,

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PROOF OF SERVICE

I, MARY K. WALL, one of the attorneys for Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 8th day of February, 1965, I served copies of the foregoing Reply Brief on WAYNE WINDLE and W. C. PETICOLAS, attorneys for Petitioner, by mailing two copies to them in a duly addressed envelope, with first class air mail postage prepaid, at the address of Suite 12-E, El Paso National Bank Building, El Paso 1, Texas.

MARY K. WALL